88-695

No. .....

Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

—o—

CLIVE MILLER, a Member of the Morongo Band of Mission Indians,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

David M. Liberman
3745 Watseka Avenue
Suite 6
Los Angeles, CA 90034
(213) 277-9288

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether the "arising under" language of 28 U.S.C. § 1362 is broader than the identical language found in 28 U.S.C. § 1331.

2. Whether an Indian Band's interpleader action against petitioner, a member of the Band, and a California tax authority arises under federal law, within the meaning of 28 U.S.C. § 1362, where the complaint alleges that the sole dispute between the adverse claimants is whether 25 U.S.C. § 410 bars the State's levy on rent money the Band owes petitioner.

3. Whether the district court properly granted leave to file an amended complaint because the original complaint's allegations of jurisdiction were substantial and the alleged defects were correctable.

LIST OF ALL PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the California State Board of Equalization was a party to the proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES TO THE PROCEEDING	ii
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. THE "ARISING UNDER" LANGUAGE OF 28 U.S.C. § 1362 IS BROADER THAN THE IDENTICAL LANGUAGE FOUND IN 28 U.S.C. § 1331.	9
II. THE BAND'S INTERPLEADER ACTION AGAINST PETITIONER, A MEMBER OF THE BAND, AND THE STATE ARISES UNDER FEDERAL LAW WITHIN THE MEANING OF 28 U.S.C. § 1362 BECAUSE THE SOLE DISPUTE BETWEEN THE ADVERSE CLAIMANTS IS WHETHER 25 U.S.C. § 410 BARS THE STATE'S LEVY ON RENT MONEY THE BAND OWES PETITIONER.	10
III. THE DISTRICT COURT PROPERLY GRANTED LEAVE TO FILE AN AMENDED COMPLAINT BECAUSE THE ORIGINAL COMPLAINT'S ALLEGATIONS OF JURISDICTION WERE SUBSTANTIAL AND THE ALLEGED DEFECTS WERE CORRECTABLE.	13
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985) 11, 12

Bryan v. Itasca County, 426 U.S. 373 (1976) 10

Field v. Volkswagenwerk AG, 626 F.2d 293 (3d Cir. 1980) 14

Franchise Tax Bd. v. Const. Laborers Vac. Trust, 463 U.S. 1 (quoting *Osborne v. Bank of United States*, 9 Wheat. 738 (1824) 9

Mollen v. Torrence, 22 U.S. (9 Wheat.) 536 (1824) 13

Northern Cheyenne Tribe v. Hallowbreast, 425 U.S. 649 (1976) 10

Oneida Indian Nation of N.Y. St. v. County of Oneida, N.Y., 414 U.S. 661 (1974) 9

St. Louis U. Trust Co. v. Stone, 570 F.2d 833 (8th Cir. 1978) 11, 12

State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967) 14

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) 14

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 10

CONSTITUTION

Article III, § 2 ..... 2, 9

STATUTES

25 U.S.C. § 345 ..... 3, 4

25 U.S.C. § 410 ..... 3, 5, 7, 10, 12, 14

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	2, 4, 7, 8, 9, 11
28 U.S.C. § 1335	4, 14
28 U.S.C. § 1353	2, 4
28 U.S.C. § 1362	2, 4, 7, 8, 9, 10
28 U.S.C. § 1653	14
28 U.S.C. § 2201	4
28 U.S.C. § 2202	4
RULES	
Fed. R. Civ. P. 22	3, 4, 8, 10

No. .....

In The

Supreme Court of the United States

October Term, 1988

CLIVE MILLER, a Member of the Morongo Band of Mission Indians,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Clive Miller prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit and entered September 20, 1988.

OPINIONS BELOW

The Court of Appeals filed its order and amended opinion on September 20, 1988. The opinion is not yet reported and is set forth as Appendix A.

On March 26, 1987, the District Court for the Northern District of California entered its order on cross mo-

tions for summary judgment (Appendix B), and on the same day entered its summary judgment (Appendix C).

JURISDICTION

The judgment and amended opinion of the Court of Appeals for the Ninth Circuit was filed September 20, 1988. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, § 2 of the Constitution provides in relevant part:

> The Judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States and treaties made, or which shall be made under their authority . . . .

Title 28 U.S.C. § 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Title 28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 U.S.C. § 1353 provides in relevant part:

> The District Court shall have original jurisdiction of any civil action involving the rights of any per-

> son in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty . . . .

Title 25 U.S.C. § 410 provides:

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

Title 25 U.S.C. § 345 provides in relevant part:

> All persons who are in whole or in part or Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant) . . . .

Fed. R. Civ. P. 22 provides in relevant part:

> (1) Persons having claims against the plaintiff may be joined as defendants and required to in-

terplead when their claims are such that the plaintiff is or may be exposed to double or multiply liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

—o—

STATEMENT OF THE CASE

On December 28, 1983, the Morongo Band of Mission Indians (Band) filed a complaint in the United States District Court for the Northern District of California under Fed. R. Civ. P. 22 invoking the court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1335, 1353, 1362, 2201, 2202, and 25 U.S.I. § 345.

A. The complaint alleged the following facts. The Band is a federally-recognized Indian Band, within the meaning of 28 U.S.C. § 1362, and the beneficial owner of unallotted trust lands within the Morongo Indian Reservation, located in California. Petitioner is an enrolled member of the Band, resides on its reservation, and is the beneficial owner of allotted parcels of trust land located within the reservation. On April 26, 1983, the Band and petitioner executed a written lease giving the Band the right to use a specified portion of petitioner's land to conduct Bingo

games. The lease provided that the Band would pay rent to petitioner from the proceeds of the games.

On or about August 16, 1983, in an effort to collect state cigarette taxes allegedly owed by petitioner, the California State Board of Equalization (the "State" or the "Board") served the Band with a notice of levy on all property in the Band's possession belonging to petitioner, including funds being held by the Band as rent. Petitioner advised the Band that he believed 25 U.S.C. § 410 and the doctrine of federal preemption of the field of the leasing of Indian trust allotments prohibited the application of the levy to the rent payments owed to him and that the Band should not respond to the levy, but should turn over the rents to him. On October 19, 1983, the Band advised the State that it believed 25 U.S.C. § 410 to be applicable to the rent payments owed to petitioner. When the State threatened to enforce the levy unless the Band turned over the money to it, the Band filed the interpleader action and deposited the funds in the Registry of the District Court. The Band prayed that the District Court order the petitioner and the State to settle between themselves their rights to the rents due, and to discharge the Band from all liability with respect to the rent payments it owed petitioner.

Subsequently the Band reversed itself and moved the District Court for an order for leave to file an amended complaint which would have changed its position, to assert that it was entitled to the funds deposited with the District Court. Following the initial denial of this motion on June 7, 1985, petitioner and the State resolved the case as between them and submitted a proposed stipulated judgment

to the Court. The Court did not accept the proposed judgment. Instead it granted the Band leave to file a renewed motion to amend, which was granted on September 26, 1986.

B. The amended complaint consisted of an interpleader claim and three claims for declaratory relief, all arising under federal law, including federal common law. The State filed an answer to the amended complaint, and petitioner filed an answer and cross-complaint. The District Court then resolved the matter on cross motions for summary judgment. (App. B) Petitioner was awarded the funds deposited on his counterclaim, and the Band was awarded summary judgment on its claim that the lease was invalid because it had not been approved by the Secretary of the Interior.

C. After full briefing, but before oral argument, the Court of Appeals filed an order on April 28, 1988 requesting the parties to file a supplemental brief discussing whether the district court had subject matter jurisdiction over the case, posing the following questions:

1. Is subject matter jurisdiction in an interpleader action determined on the basis of plaintiff's complaint or by considering the coercive actions that could have been filed by the defendants against the plaintiff had the plaintiff not sought anticipatory relief by instituting the interpleader action? *See Bell & Beckwith v. USA*, 766 F.2d 910, 914, (6th Cir. 1985) ("In interpleader actions as in declaratory judgment actions, federal question jurisdiction exists if such jurisdiction would have existed in a coercive action by the defendant."); *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 209 F.2d 467, 473-74 (9th Cir. 1953).

2. If subject matter jurisdiction in an interpleader action is determined on the basis of plaintiff's

complaint, does the interpleader claim set forth in the Morongo Band's First Amended Complaint arise under federal law?

3. If subject matter jurisdiction in an interpleader action is determined by considering the coercive actions that could have been filed by the defendants against the plaintiff, do the coercive actions that could have been filed by Miller and the Board against Morongo Band arise under federal law?

All of the parties contended that the District Court had jurisdiction. The Court of Appeals disagreed and held that the District Court lacked subject matter jurisdiction over the original complaint, and that all its orders, including its order permitting the filing of an amended complaint, were void.

The Ninth Circuit held that subject matter jurisdiction did not exist under 28 U.S.C. §§ 1331 or 1362 because the cause allegedly did not "arise under" federal law. To reach this result the Ninth Circuit disregarded as surplusage the complaint's allegation that 25 U.S.C. § 410 barred the state's levy, explaining:

> Once we disregard the Band's superfluous allegations, we find the complaint insufficient to raise a federal question. The Band claims for *itself* no right or immunity under any federal law, nor does it allege a federal cause of action. [App. A-20, (Emphasis in original)].

The Court declined to interpret the "arising under" language in § 1362 more broadly than the same language in § 1331, and rejected petitioner's claim that the District Court had jurisdiction because he could have filed

a coercive action against the Band and against the State "arising under" federal law.

———o———

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the case involves important issues concerning the rights of an American Indian who seeks to have a federal court interpret a federal statute enacted for his benefit.

After the District Court awarded the interpleaded funds to petitioner, the Ninth Circuit vacated the judgment holding that the District Court did not have jurisdiction over the action. In doing so, the Ninth Circuit declined to interpret the "arising under" language of 28 U.S.C. § 1362 more broadly than the same language found in 28 U.S.C. § 1331. Heretofore the Court has recognized this as an open question.

Another reason for granting the writ is the existing confusion in the appellate courts as to the proper reach of an interpleader action filed pursuant to Fed. R. Civ. P. 22.

I.

THE "ARISING UNDER" LANGUAGE OF 28 U.S.C. § 1362 IS BROADER THAN THE IDENTICAL LANGUAGE FOUND IN 28 U.S.C. § 1331

The Court should grant the writ because the case raises the important question whether Congress in enacting § 1362 intended to grant an Indian Band, with a governing body duly recognized by the Secretary of the Interior, greater access to the District Court than the Band would have under § 1331, by expanding its "arising under" jurisdiction. The Court acknowledged the existence of the question in *Oneida Indian Nation of N.Y. St. v. County of Oneida, N.Y.*, 414 U.S. 661, 682 n.16 (1974), stating:

> [W]e have no occasion to address and do not reach the contention pressed by petitioners that the Congress, in enacting § 1362 in 1966, 80 Stat. 890, intended to expand the scope of "arising under" jurisdiction in the district court beyond what judicial interpretations of that language would have allowed under § 1331, for that category of suits brought by Indian tribes . . . .

Petitioner contends that in light of the government's special concern in relation to the American Indian, the "arising under" language of § 1362 should be given a broader meaning than it receives under § 1331 and should be given the same broad meaning the identical language enjoys under Art. III, § 2 of the Constitution. The constitutional language has been construed as permitting Congress to extend federal jurisdiction to any case of which federal law potentially "forms an ingredient." *Franchise Tax Bd. v. Const. Laborers Vac. Trust*, 463 U.S. 1, 8 n.8 (quoting *Osborne v. Bank of United States*, 9 Wheat. 738, 823 (1824)).

There is no policy reason for not giving a duly recognized Indian Band access to federal court to the full extent

permitted by the Constitution. On the contrary the Court has always applied a canon of construction that statutes involving Indian interests are to be construed in favor of the Indians. *See, e.g., Bryan v. Itasca County,* 426 U.S. 373, 392 (1976); *Washington v. Yakima Indian Nation,* 439 U.S. 463, 484 (1979); *Northern Cheyenne Tribe v. Hallowbreast,* 425 U.S. 649, 655 n.7 (1976) (in which the Court referred to the rule as "this eminently sound and vital canon").

From a practical point of view there is no reason to believe that giving a broad construction to the "arising under" language of § 1362 will result in an undue burden on the federal courts.

II.

THE BAND'S INTERPLEADER ACTION AGAINST PETITIONER, A MEMBER OF THE BAND, AND THE STATE ARISES UNDER FEDERAL LAW WITHIN THE MEANING OF 28 U.S.C. § 1362 BECAUSE THE SOLE DISPUTE BETWEEN THE ADVERSE CLAIMANTS IS WHETHER 25 U.S.C. § 410 BARS THE STATE'S LEVY ON RENT MONEY THE BAND OWES PETITIONER.

The original complaint alleges that the sole dispute between petitioner and the State is whether the State's levy was barred by 25 U.S.C. § 410. If the "arising under" language of § 1362 were given the broad meaning suggested above, the District Court plainly had jurisdiction over the action. It also had jurisdiction under the Ninth Circuit's narrow construction of § 1362.

In *St. Louis U. Trust Co. v. Stone,* 570 F.2d 833 (8th Cir. 1978) there was a dispute between the Internal Revenue Service and a taxpayer concerning funds held by a trust company. Faced with conflicting claims, the company brought an interpleader action pursuant to Rule 22 seeking an injunction restraining the government from enforcing its levies against the trust company pending resolution of the dispute, and an order declaring the trust company's rights and duties under its escrow agreement.

The District Court granted the government's motion to dismiss the interpleader action for lack of jurisdiction. The Eighth Circuit reversed holding that jurisdiction existed under § 1331. The Court stated that because the operation of government tax liens involves federal law, it "necessarily follows that there is federal jurisdiction to decide such questions." *Id.* at 835.

Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985) disagreed with *Stone* stating:

> To the extent that our result deviates from the result or analysis in *Stone* we decline to follow the Eighth Circuit's decision.

Id. at 916 n.1.

Bell & Beckwith analogized an interpleader action filed pursuant to Rule 22 to a declaratory judgment action, stating that federal jurisdiction exists only if any possible suit by claimants against the stakeholder, or by claimants

against each other, necessarily involved resolution of a federal question. After looking at all possible suits, the Sixth Circuit concluded that there was no jurisdiction, because the only controversy was between the two adverse claimants, and that dispute "was purely a question of state law." *Id.* at 916. The plain implication of *Bell & Beckwith* is that federal jurisdiction would exist if the dispute was purely a question of federal law.

The Ninth Circuit purported to follow *Bell & Beckwith*, disregarding the fact that the dispute between petitioner and the State was solely a question of federal law. The Ninth Circuit examined *some* of the coercive actions anticipated by the Band's complaint and concluded, mistakenly, that petitioner could not file any coercive action involving federal law. In reality petitioner could have filed an injunction action against a state official in his individual capacity to enjoin enforcement of the state's levy in violation of § 410. *See St. Louis U. Trust Co. v. Stone, supra.* Similarly, petitioner could have filed an injunction against a Band member acting in his individual capacity, to enjoin the Band from honoring the state's levy in violation of § 410.

Federal question jurisdiction exists in this case because petitioner could have filed a coercive action against both the Band and the State under federal law.

III.

THE DISTRICT COURT PROPERLY GRANTED LEAVE TO FILE AN AMENDED COMPLAINT BECAUSE THE ORIGINAL COMPLAINT'S ALLEGATIONS OF JURISDICTION WERE SUBSTANTIAL AND THE ALLEGED DEFECTS WERE CORRECTABLE.

The Ninth Circuit did not assert that the first amended complaint did not arise under federal law. Rather, it held that the District Court had no jurisdiction over the original complaint and therefore had no power to grant leave to file an amended complaint. The Ninth Circuit acknowledged that if there were proper jurisdiction over the Band's original complaint, the District Court had the power to grant leave for the Band to file its amended complaint and to consider any additional jurisdictional claims presented therein. App. A-12, n.3.

The Ninth Circuit cited only one case from this Court to support its holding that a District Court is without power to grant leave to amend if there was no jurisdiction under the original complaint. *Mollen v. Torrence*, 22 U.S. (9 Wheat.) 536, 538 (1824). *Mollen* was an action on a note, with jurisdiction based on diversity. At the time of the filing of the suit, plaintiff and defendant were citizens of different states, but, during the pendency of the action they had both become citizens of the same state. The Court held that once subject matter jurisdiction vested because of diversity, subsequent events would not require the matter to be dismissed for lack of jurisdiction. The Court did not

address the effect to be given an amended complaint filed in an action in which the district court originally lacked subject matter jurisdiction.

The Ninth Circuit rejected petitioner's claim of jurisdiction pursuant to § 1335 on the ground, *inter alia,* that the members of the state taxing authority were sued in their "official capacity." App. A-15, n.5. The Band could have sued them in their individual capacity, thus giving the district court jurisdiction under § 1335. *See Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939) and *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523 (1967). The district court had power to grant leave to amend the defective allegation. 28 U.S.C. § 1653.

On its face the complaint arose under federal law. The Ninth Circuit found the complaint insufficient only after it disregarded as "surplusage" the allegations concerning § 410. App. A-18. Assuming *arguendo* that the Ninth Circuit correctly disregarded all reference to § 410, the allegation nevertheless gave the District Court sufficient jurisdiction to permit an amendment. See the dissenting views in *Field v. Volkswagenwerk AG,* 626 F.2d 293, 309-310 (3rd Cir. 1980) (§ 1653 should be liberally applied, for the purpose of avoiding dismissals that result only in the refiling of a properly amended complaint).

The District Court properly granted leave to file an amended complaint because the original complaint's allegations of jurisdiction were substantial and the defects were correctable.

CONCLUSION

For the aforesaid reasons, the Court should grant the writ of certiorari to the United States Court of Appeals.

Respectfully submitted,

DAVID M. LIBERMAN

Attorney for Petitioner

Dated: October, 1988

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MORONGO BAND OF MISSION INDIANS, *Plaintiff/Counterclaim-Defendant/Appellant,* v. CALIFORNIA STATE BOARD OF EQUALIZATION; RICHARD NEVINS, in his official capacity as Chairman of the State Board of Equalization; CONWAY H. COLLIS, in his official capacity as a member of State Board of Equalization; ERNEST J. DRONENBURG, JR., in his official capacity as a member of the State Board of Equalization; WILLIAM M. BENNETT, in his official capacity as a member of the State Board of Equalization, *Defendants/Appellees,* CLIVE MILLER, *Defendant/Counterclaimant/Appellee.*	No. 87-2320 D.C. No. CV-83-6190-SC

MORONGO BAND OF MISSION INDIANS, *Plaintiff/Counterclaim-Defendant/Appellee,* v. CALIFORNIA STATE BOARD OF EQUALIZATION, et al., *Defendants,* and CLIVE MILLER, *Defendant/Counterclaimant/Appellant.*	No. 87-2371
MORONGO BAND OF MISSION INDIANS, *Plaintiff/Appellee,* v. CALIFORNIA STATE BOARD OF EQUALIZATION, *Defendant Appellant.*	No. 87-2393 ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California (San Francisco)
Samuel Conti, District Judge, Presiding

Argued and Submitted
May 10, 1988—San Francisco, California

Filed June 14, 1988
Amended September 20, 1988

Before: James R. Browning, Arthur L. Alarcon and
William A. Norris, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Jurisdiction/Courts and Procedure/Indians

Appeal from judgment. Vacated and remanded with instructions to dismiss. The court held that the district court improperly exercised subject matter jurisdiction over an Indian tribe's action in the nature of interpleader against a member of the tribe and a state tax authority.

Plaintiff Morongo Band of Mission Indians leased Indian trust land beneficially owned by defendant band member Clive Miller. Defendant California State Board of Equalization levied on funds held by the Band and allegedly owed to Miller as rent under the lease. The Band deposited the disputed funds into the district court and instituted an action in the nature of interpleader. The Band amended its complaint to assert its own claim to the funds. Miller thereupon filed a counterclaim alleging claims for unpaid rent. The district court granted summary judgment for the Band on its claim that the lease was invalid. The court also granted summary judgment

for Miller on his claim for the reasonable value of the Band's use of his property. All parties appealed.

[1] In determining federal court jurisdiction, the court looks to the original complaint. [2] The complaint originally filed by the Band alleged one claim—interpleader. [3] Contrary to the Band's assertion, jurisdiction is unavailable under the Federal Interpleader Act, 28 U.S.C. § 1335. That section requires that two or more of the adverse claimants to the interpleaded funds be of diverse citizenship. An an agency of the State of California, the Board has no citizenship for the purposes of section 1332. A suit between a State and a citizen is not between citizens of different States. Hence, the adverse claimants—Miller and the Board—are not of diverse citizenship. [4] Section 345 provides jurisdiction over cases in which an Indian's interest in allotted trust land is at issue. Similarly, 28 U.S.C. § 1353 confers the district courts with jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty. [5] Characterizing the deposited funds as "rents due to MILLER," the complaint assumed the validity of Miller's interest and his authority to enter into a lease with respect to that interest. The sections therefore, are inapplicable. [6] The Band is also precluded from grounding jurisdiction on the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. The Act creates a remedy in cases otherwise within the court's jurisdiction; it does not constitute an independent basis for jurisdiction. [7] Under 28 U.S.C. §§ 1331 and 1362, jurisdiction depends on whether the Band's interpleader action arises under federal law. [8] An action arises under federal law if that law creates the cause of

action or if a substantial question of federal law is a necessary element of plaintiff's cause of action. The federal-law element must appear on the face of plaintiff's *well-pleaded* complaint. [9] As a result of the well-pleaded complaint rule, few interpleader complaints have been found to qualify for federal question jurisdiction. [10] The Band's allegations regarding section 410 and the pre-emption doctrine must be disregarded in assessing whether the complaint supports federal jurisdiction because they are surplusage. [11] Nor is jurisdiction proper under 28 U.S.C. § 1331. Had the Band not instituted the present action, Miller would have sought recovery of the disputed rents by instituting an action against the Band for breach of lease. Breach of lease is a cause of action under state, not federal, law. The Band's likely federal-law defenses would not be part of Miller's well-pleaded complaint for breach of lease and, thus, would not support federal jurisdiction over Miller's state-law claim. [12] Moreover, the Band's interpleader action also anticipated a coercive action by the Board to enforce its tax levy against rent owed to Miller in the possession of the Band. The anticipated enforcement action would not arise under federal law.

COUNSEL

George Forman, Alexander & Karshmer, Berkeley, California, for the plaintiff/counterclaim-defendant/appellant: appellee Morongo Band of Mission Indians.

Julian O. Standen, Assistant Attorney General, San Francisco, California, for the defendants/appellant/appellees California State Board of Equalization.

Robert C. Moest, Fisher & Moest, Los Angeles, California, for the defendant / counterclaimant / appellant / appellee Clive Miller.

ORDER

The opinion filed in this case on June 14, 1988 is hereby amended in the following respects:

1. Slip op. at 6979, second paragraph, line 15—change the semi-colon after "(1974)" to a period and add the following footnote after the period:

> The only case cited by Miller in which the court analyzed whether jurisdiction existed on the basis of an amended complaint is *Boelens v. Redman Homes, Inc.*, 759 F.2d 504 (5th Cir. 1985) [*Boelens II*]. In *Boelens,* the original complaint alleged four claims which appeared to arise under federal law. Plaintiffs later amended their complaint to eliminate all but one of such claims, and the case proceeded to trial. On appeal from the final judgment, the Fifth Circuit ruled that plaintiffs' remaining claim did not support federal jurisdiction. *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1071 (5th Cir. 1984) [*Boelens I*]. The court remanded the case with directions that it be dismissed for lack of subject matter jurisdiction. *Id.* On petition for rehearing, the court rejected plaintiffs' argument that jurisdiction should have been determined by the original, not the amended, complaint. *Boelens II*, 759 F.2d at 507-08.
>
> The principal distinction between this matter and *Boelens* is that in *Boelens,* the Fifth Circuit concluded that while the district court had jurisdiction at the outset, it was lost because the plaintiff voluntarily amended the complaint. In the present case, the district court *lacked* jurisdiction at the outset. Moreover, *Boelens* in no way conflicts with our ruling that a district court is powerless to grant leave to amend

when it lacks jurisdiction over the original complaint. In fact, *Boelens* fully supports our conclusion. The Fifth Circuit held that the district court should have ordered dismissal because the amended complaint failed to support federal jurisdiction. *Boelens I*, 748 F.2d at 1071; *see also Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979) (where complaint filed in state court action that was later removed to federal court failed to state a federal question, "no federal jurisdiction existed to entertain a later amendment to the complaint").

2. Slip op. at 6979, second paragraph, lines 15-20—Delete the citation to *Boelens*.

3. Slip op. at 6989 n.7—Add the following at the end of footnote 7:

Miller argues that his coercive action would have arisen under 25 U.S.C. § 345 and 28 U.S.C. § 1353. As noted above, these sections confer the district courts with jurisdiction over suits in which an Indian's interest in allotted trust land is at issue. Slip op. at 11869. These sections do not authorize jurisdiction over an action to recover rents owing under a lease of a building, even when the building happens to sit on allotted trust land. The cases on which Miller relies are distinguishable in that each was an action to protect an Indian's right to, or interest in, allotted trust land. *See Begay v. Albers*, 721 F.2d 1274, 1276 (10th Cir. 1983) (suit by individual Indians to cancel certain allegedly forged deeds purporting to convey their fee interests in allotted tracts; plaintiffs sought recovery of possession and an order quieting their beneficial title); *Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979) (suit by individual Indians seeking compensation for right-of-way over their allotted lands taken by federal government and municipality; federal statutes protected Indian allottees from improvident grants of rights-of-way); *Scholder v.*

United States, 428 F.2d 1123, 1129 (9th Cir.) (suit by individual Indians seeking injunctive relief to prevent federal government from charging against the Indians' trust lands the costs of constructing a lateral irrigation line; charges amounted to a lien on the lands, which impaired Indians' interests therein), *cert. denied*, 400 U.S. 942 (1970).

Our understanding of the scope of jurisdiction conferred by §§ 345 and 1353 is confirmed by the Supreme Court's pronouncement on the subject in *United States v. Mottaz*, 476 U.S. 834 (1986). The Court in *Mottaz*, citing *Scholder*, declared that § 345 contemplates two types of suits: those seeking the issuance of an allotment, and those involving an Indian's interest in or right to an allotment once he has acquired it. *Id.* at 845. Miller's coercive action against the Band would have fallen into neither category.

In *Keechi v. United States*, 604 F. Supp. 267 (D.D.C. 1984), also cited by Miller, the court ruled it had jurisdiction under §§ 345 and 1353 over an individual Indian's suit seeking to prevent the IRS from enforcing a levy on royalties derived from an oil and gas lease of plaintiff's allotted trust land. To the extent *Keechi* can be read to mean that §§ 345 and 1353 provide a basis for jurisdiction over any suit in which an Indian seeks to collect or preserve income derived from leases of allotted trust lands, the opinion is inconsistent with the foregoing authorities. *Keechi*, however, need not be read so broadly. The funds at issue there were not rents due under the lease of a capital improvement but royalties earned from oil production, an activity that depletes the land's resources and, thus, reduces the value of the allottee's interest in the land.

4. Renumber footnotes as necessary in light of the foregoing revisions.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en

banc filed by Appellee and Cross-Appellant Clive Miller. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

ALARCON, Circuit Judge:

I. INTRODUCTION

The question presented in this case is whether the district court properly exercised subject matter jurisdiction over an Indian tribe's action in the nature of interpleader against a member of the tribe and a state tax authority. We hold that it did not. Accordingly, we vacate the district court's judgment in all respects and remand with instructions that the case be dismissed.

II. BACKGROUND

Plaintiff/Counterclaim-Defendant/Appellant/Cross/Appellee Morongo Band of Mission Indians (the Band) leased Indian trust land beneficially owned by Defendant:Counterclaimant/Appellee/Cross-Appellant Clive Miller (Miller), a member of the Band. The lease was never approved by the Secretary of the Interior (the Secretary).

On August 16, 1983, Defendant/Appellee/Cross-Appellant California State Board of Equalization (the Board) levied on funds held by the Band and allegedly owed to Miller as rent under the lease. On December 28, 1983, the Band deposited the disputed funds into the registry of the district court and instituted an action in the nature of in-

terpleader. The Band asserted no claim to the deposited funds.

On September 26, 1986, the district court granted the Band leave to amend its complaint to assert its own claim to the funds under the theory that the lease with Miller was invalid for lack of approval by the Secretary.[1] Miller thereupon filed a Counterclaim alleging claims for unpaid rent under the lease, for the reasonable value of the Band's use of his property, for bad faith, and for violations of the Indian Civil Rights Act, 25 U.S.C. § 1302.

The district court granted summary judgment for the Band on its claim that the lease was invalid. The court also granted summary judgment for Miller on his claim for the reasonable value of the Band's use of his property. All parties appealed.

The briefs initially filed in this court did not discuss the question of federal subject matter jurisdiction over interpleader actions. We called for supplemental briefing on the question. Each of the parties contends that the district court properly exercised jurisdiction pursuant to the general federal question statute, 28 U.S.C. § 133 (1982).

III. ANALYSIS

The fact that none of the parties contests the district court's jurisdiction does not, of course, relieve us of our responsibility to determine whether the court's exercise of jurisdiction was proper. The parties have no power to

---

[1]The Band was required to obtain leave of court before filing its amended complaint because the defendants had long before answered the original complaint. *See* Fed. R. Civ. P. 15(a).

confer jurisdiction on the district court by agreement or consent. *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1374 (9th Cir.), *cert. denied*, 108 S.Ct. 150 (1987); *Janakes v. United States Postal Service*, 768 F.2d 1091, 1095 (9th Cir. 1985). If the district court had no jurisdiction over the subject matter, the action should have been dismissed, regardless of the parties' preference for an adjudication in federal court.

[1] The district court, believing that it had jurisdiction based on the original interpleader claim, granted the Band leave to file an amended complaint realleging the interpleader claim and adding three claims for declaratory relief. In determining federal court jurisdiction, we look to the original rather than to the amended complaint. Subject matter jurisdiction must exist as of the time the action is commenced. *See Mullen v. Torrance*, 22 U.S. (9 Wheat.) 536, 538 (1824) (jurisdiction "depends upon the state of things at the time of the action brought"); *Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 248 (7th Cir. 1981) ("Jurisdictional questions are answered by reference to the time of the filing of an action . . . ."), *cert. denied*, 455 U.S. 993 (1982); *Mobil Oil Corp. v. Kelley*, 493 F.2d 784, 786 (5th Cir.) (jurisdiction "is determined at the outset of the suit"), *cert. denied*, 419 U.S. 1022 (1974).[2] If jurisdiction

---

[2]The only case cited by Miller in which the court analyzed whether jurisdiction existed on the basis of an amended complaint is *Boelens v. Redman Homes, Inc.*, 759 F.2d 504 (5th Cir. 1985) [*Boelens II*]. In *Boelens*, the original complaint alleged four claims which appeared to arise under federal law. Plaintiffs later amended their complaint to eliminate all but one of such claims, and the case proceeded to trial. On appeal from the final judgment, the Fifth Circuit ruled that plaintiffs' remain-

(Continued on following page)

is lacking at the outset, the district court has "no power to do anything with the case except dismiss." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3844, at 332 (1986) (footnote omitted); *accord United States v. Boe*, 543 F.2d 151, 159 (C.C.P.A. 1976) (when subject matter jurisdiction is lacking, the district court "ha[s] no power to do anything, other than to dismiss the action," and any order other than to dismiss is a nullity).[3] Ac-

---

(Continued from previous page)

ing claim did not support federal jurisdictio. *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1071 (5th Cir. 1984) [*Boelens I*]. The court remanded the case with directions for rehearing, the court rejected plaintiffs' argument that jurisdiction should have been determined by the original, not the amended, complaint. *Boelens II*, 759 F.2d at 507-08.

The principal distinction between this matter and *Boelens* is that in *Boelens*, the Fifth Circuit concluded that while the district court had jurisdiction at the outset, it was lost because the plaintiff voluntarily amended the complaint. In the present case, the district court *lacked* jurisdiction at the outset. Moreover, *Boelens* in no way conflicts with our ruling that a district court is powerless to grant leave to amend when it lacks jurisdiction over the original complaint. In fact, *Boelens* fully supports our conclusion. The Fifth Circuit held that the district court should have ordered dismissal because the amended complaint failed to support federal jurisdiction. *Boelens I*, 748 F.2d at 1071; *see also Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979) (where complaint filed in state court action that was later removed to federal court failed to state a federal question, "no federal jurisdiction existed to entertain a later amendment to the complaint").

[3]When the district court has jurisdiction over the action at the outset but the complaint inadequately alleges jurisdiction, the court may grant leave to amend the defective allegations. *See* 28 U.S.C. § 1653 (1982) ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."). Section 1653 provides a remedy for defective *allegations* only; "it does not provide a remedy for defective jurisdiction itself." *Field v. Volkswagenwerk AG*, 626 F.2d 293, 306

(Continued on following page)

cordingly, we must examine the Band's original complaint to determine whether the claim alleged therein was one over which the district court had jurisdiction. If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities.

[2] The complaint originally filed by the Band alleged one claim—interpleader. The facts alleged to support the claim were as follows: The Band is a federally-recognized Indian tribe. It is the beneficial owner of unallotted trust lands within the Morongo Indian Reservation, which is located in Riverside County, California. Miller is a member of the Band and resides on its reservation. He is the beneficial owner of allotted parcels of trust land located within the reservation. On April 26, 1983, the Band and Miller executed a written lease giving the Band the right to use a specified portion of Miller's land to conduct bingo games. The lease provided that the Band would pay rent to Miller from the proceeds of the games. On or about August 16, 1983, in an effort to collect state cigarette taxes owed by Miller, the Board served the Band with a Notice of Levy on all property in the Band's possession belonging to Miller, including funds being held by the Band as rent. Miller subsequently demanded that the Band pay him the rent in question, contending that the rent was exempt from

---

(Continued from previous page)

(3d Cir. 1980) (2-1); *accord Brennan v. University of Kansas*, 451 F.2d 1287, 1289 (10th Cir. 1971) (section 1653 empowers the courts to correct "defects of form, not substance") (footnote omitted). As we explain below ,the defect in the present case is one of substance—the case does not arise under federal law. The district court, therefore, had no power to grant the Band leave to amend its complaint.

the Board's levy under 25 U.S.C. § 410[4] and the doctrine of federal preemption of the field of leases of Indian trust land. Faced with conflicting claims to the rent, the Band deposited $292,000 into the registry of the district court and instituted the present action.

[3] In its complaint, the Band did not assert any right to the deposited funds. Rather, it characterized the funds as "rents due to MILLER for the months of September through December, 1983." By way of relief on its claim for interpleader, the Band prayed that the district court "[o]rder the defendants to interplead and settle between themselves their rights to the rents due under the said lease; . . . [o]rder that plaintiffs are discharged from all liability with respect to the rent payments deposited with the Court . . . ; [and] [o]rder that the rents deposited with the Court be paid to the party whom the Court shall adjudge entitled to them . . . ."

The complaint alleged subject matter jurisdiction under 28 U.S.C. §§ 345, 1331, 1335, 1353, 1362, 2201, and 2202. Contrary to the Band's assertion, jurisdiction is unavailable under the Federal Interpleader Act, 28 U.S.C. § 1335 (1982). That section requires that two or more of the adverse claimants to the interpleaded funds be "of diverse citizenship as defined in section 1332 of this title." 28

---

[4]Section 410 provides, in pertinent part:

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period . . . except with the approval and consent of the Secretary of the Interior.

25 U.S.C. § 410 (1982).

U.S.C. § 1335(a)(1) (1982); *see State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) (section 1335 "has been uniformly construed to require . . . diversity of citizenship between two or more claimants"). According to the Band's complaint, the Board "is an agency of the State of California charged by law with the assessment and collection of state taxes." As an agency of the State of California, the Board has no "citizenship" for the purposes of section 1332. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) ("There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction."); *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894) ("A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States . . . ."). Hence, the adverse claimants—Miller and the Board—are not of diverse citizenship.[5]

In addition to section 1335, Fed. R. Civ. P. 22 provides for interpleader actions in the federal courts. Rule 22,

---

[5]The Band also named as defendants certain individual members of the Board. Each of these individuals was expressly sued "in his official capacity as a member of the [Board]." A claim alleged against a state officer acting in his official capacity is treated as a claim against the state itself. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); *Monell v. Department of Social Services*, 436 U.S. 658, 690 n.55 (1978) (official-capacity suits "represent only another way of pleading an action against an entity of which an officer is an agent"). We, therefore, disregard the citizenship of the individual Board members in assessing jurisdiction under section 1335. *See Northeast Federal Credit Union v. Neves*, 837 F.2d 531, 534 (1st Cir. 1988) (defendant state tax assessor, sued under section 1335 in his official capacity, "has *no* citizenship for jurisdictional purposes").

however, is merely a procedural device; it confers no jurisdiction on the federal courts. *Gelfgren v. Republic Nat'l Life Ins. Co.*, 680 F.2d 79, 81 (9th Cir. 1982); *see* Fed. R. Civ. P. 82 (federal rules shall not be construed to extend or limit subject matter jurisdiction). Accordingly, an interpleader action under Rule 22 must fall within some statutory grant of jurisdiction.[6] *Gelfgren*, 680 F.2d at 81; *St. Louis Union Trust Co. v. Stone*, 570 F.2d 833, 835 (8th Cir. 1978). We shall proceed to consider the statutory grants of jurisdiction on which the Band has sought to rely.[7]

[4] Excluding section 1335, which is inapplicable to the present case for the reasons discussed above, the Band alleged subject matter jurisdiction under 28 U.S.C. §§ 345, 1331, 1353, 1362, 2201, and 2202. Title 28 contains no section numbered 345. We assume that the Band intended to allege jurisdiction under 25 U.S.C. § 345. That section confers the district courts with jurisdiction over "any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of

---

[6]The mere fact that an Indian tribe is a party to the action is insufficient to establish jurisdiction. *See* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3579, at 255 (1984) ("Although the federal government has long had a special relation to the American Indian, there is no jurisdiction in the federal courts to hear a case merely because an Indian or an Indian tribe is a party to it.") (footnote omitted).

[7]"Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 3233 n.6 (1986). Because the Band did not purport to base jurisdiction on 28 U.S.C. § 1332 (diversity of citizenship), we express no opinion as to whether jurisdiction would be proper under that section.

land under any law or treaty . . . .'' 25 U.S.C. § 345 (1982). In short, section 345 provides jurisdiction over cases in which an Indian's interest in allotted trust land is at issue. *See* F. Cohen, *Handbook of Federal Indian Law* 314 (1982) (''The basic requisite for jurisdiction [under 25 U.S.C. §§ 345-346] is an issue concerning Indian ownership of all or a portion of an allotment under federal restrictions.'') (footnote omitted). Similarly, 28 U.S.C. § 1353 confers the district courts with ''jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.'' 28 U.S.C. § 1353 (1982).

[5] The Band's complaint did not dispute Miller's interest in or entitlement to the leased premises. On the contrary, in characterizing the deposited funds as ''rents due to MILLER,'' the complaint assumed the validity of Miller's interest and his authority to enter into a lease with respect to that interest. Sections 345 and 1353, therefore, are inapplicable to the present case.

[6] The Band is also precluded from grounding jurisdiction on the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1982 & Supp. III 1985). The Declaratory Judgment Act merely creates a remedy in cases otherwise within the court's jurisdiction; it does not constitute an independent basis for jurisdiction. *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (per curiam).

[7] The remaining bases for jurisdiction alleged by the Band are 28 U.S.C. §§1331 and 1362. Section 1331 provides: ''The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.'' 28 U.S.C. § 1331

(1982). Section 1362 provides: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1982). Under both sections, jurisdiction depends on whether the Band's interpleader action "arises under" federal law. *See Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714 (9th Cir. 1980) (declining to interpret "arising under" language in section 1362 more broadly than identical language in section 1331), *cert. denied*, 451 U.S. 911 (1981).

[8] The Supreme Court has explained that an action arises under federal law if that law creates the cause of action, *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), or if a substantial question of federal law is a necessary element of plaintiff's cause of action, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-202 (1921). Moreover, the Court has long and consistently held that the federal-law element must appear on the face of plaintiff's *well-pleaded* complaint. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983). This means that a plaintiff may not establish federal jurisdiction by asserting in its complaint that the defendant will raise a federal-law *defense* to the plaintiff's claim, *id.* at 13-14, or by including in its complaint allegations of federal-law questions that are not essential to its claim, *id.* at 10.

[9] As a result of the well-pleaded complaint rule, "few interpleader complaints have been found to qualify

for federal question jurisdiction. Interpleader is a procedural device available to a stakeholder to resolve a dispute that exists primarily between the defendant claimants. The stakeholder's claim is typically one seeking discharge and is difficult to characterize as asserting either federal or state rights." *Banco de Ponce v. Hinsdale Supermarket Corp.*, 663 F. Supp. 813, 816 (E.D.N.Y. 1987) (citation omitted). *But see St. Louis Union Trust Co.*, 570 F.2d at 835 (finding federal question jurisdiction over interpleader action in which plaintiff sought, *inter alia*, injunction against enforcement of federal tax lien).

[10] The Band's complaint alleges that Miller contends that the Board's levy is barred by 25 U.S.C. § 410 and by the doctrine of preemption, and that the Board argues to the contrary. These allegations are surplusage; they merely anticipate the arguments likely to be advanced by the defendants against each other. Neither section 410 nor the preemption doctrine forms any part of the Band's own well-pleaded claim. Accordingly, the foregoing allegations must be disregarded in assessing whether the complaint supports federal jurisdiction. *See Gardner v. Schaffer*, 120 F.2d 840, 842 (8th Cir. 194) (per curiam) (finding no federal question jurisdiction over interpleader action, notwithstanding plaintiff's allegation that defendant relied on federal statute in asserting claim to disputed funds); *Cowan v. United States*, 172 F. Supp. 291, 293-94 (S.D.N.Y. 1959) (finding no federal question jurisdiction over interpleader action, notwithstanding plaintiff's allegation that defendants' respective rights to interpleaded funds were governed by federal statute); *cf. Gelfgren*, 680 F.2d at 81 (where plaintiff's state court action was prop-

erly removed, federal court had jurisdiction over defendant's cross-complaint for Rule 22 interpleader).

Once we disregard the Band's superfluous allegations, we find the complaint insufficient to raise a federal question. The Band claims for *itself* no right or immunity under any federal law, nor does it allege a federal cause of action.

This does not, however, conclude our analysis. The Sixth Circuit, in a thorough and well-reasoned opinion, has examined the issue of federal question jurisdiction over interpleader actions under Rule 22. *See Bell & Beckwith v. United States,* 766 F.2d 910 (6th Cir. 1985). We find that court's analysis helpful, particularly because *Bell & Beckwith* involved facts similar to those underlying the present case. There, the Internal Revenue Service (IRS) levied on an account held by a stock-broker. The broker then instituted an interpleader action, naming as defendants the IRS and the party claiming ownership of the account. *Id.* at 911.

The Sixth Circuit observed that the complaint failed to assert a federal claim against the defendants. *Id.* at 912. The court noted, however, that "federal question jurisdiction exists in those cases in which the plaintiff's claim, though itself not raising a federal question, asserts a defense to a claim that would raise a federal question and that defendant could have asserted in a coercive action." *Id.* Recognizing that this principle has been invoked primarily in declaratory judgment actions, the court cogently explained why the principle should also apply to Rule 22 interpleader actions:

> [A] plaintiff may use an interpleader action [under Rule 22] to anticipate and accelerate a coercive action by the defendant. The issue to be adjudicated remains the same, but interpleader may be used "to reach an early and effective determination of disputed questions." 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1702 (1972). . . . Thus, the purpose of, and procedural advantage provided by, an interpleader action may be the same as that of the declaratory judgment action—the actions "enabl[e] a defendant to precipitate a plaintiff's suit in order to avoid multiple liability or other inconvenience." *Thomas v. Shelton*, 740 F.2d 478, 485 (7th Cir. 1984). In interpleader actions as in declaratory judgment actions, federal questions jurisdiction exists if such jurisdiction would have existed in a coercive action by the defendant.

Id. at 914.

In an interpleader action, as in an action for declaratory relief, the plaintiff seeks an adjudication of claims that the defendants threaten to assert against the plaintiff. Whether the action is styled as one for interpleader or for declaratory relief, the cause of action litigated is not that of the plaintiff but that of the defendants. *See Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984) (in an action for declaratory judgment("the underlying cause of action which is . . . actually litigated is the declaratory defendant's, not the declaratory plaintiff's"). Federal jurisdiction over both types of actions is proper if the cause(s) of action anticipated by the plaintiff's suit would arise under federal law. *Bell & Beckwith*, 766 F.2d at 914; *Banco de Ponce*, 663 F. Supp. at 817 ("[F]ederal question jurisdiction exists if at least one of the threatened actions fairly alleged in the interpleader complaint arises under federal law.").

Applying the foregoing principles to the case before it, the Sixth Circuit concluded that state law would have been determinative of each of the coercive actions anticipated by the interpleader claim. 766 F.2d at 915-16. Accordingly, the court ordered dismissal of the action for lack of jurisdiction. *Id.* at 917.

The First Circuit employed a similar analysis in *Northeast Fed. Credit Union v. Neves,* 837 F.2d 531 (1st Cir. 1988). There, the State of Maine levied on certain accounts on deposit in a New Hampshire-based credit union. Maine then instituted a state court action to enforce the levies. The credit union responded by instituting an interpleader action in the United States District Court for the District of New Hampshire, naming as defendants Maine's tax assessor and the owners of the accounts in question. *Id.* at 531-32. Plaintiff contended that a federal statute barred Maine from levying on the deposits. *Id.* at 532.

Because the claimants to the funds in question were not of diverse citizenship, jurisdiction was improper under section 1335. *Id.* at 534. The court proceeded to consider whether jurisdiction could be premised on section 1331. The court concluded that federal question jurisdiction was unavailable, because the federal questions asserted by the plaintiff were simply defenses to Maine's state-law claim for enforcement of the tax levy:

> [Plaintiff's] newly-emergent claim of federal right is nothing more than an anticipatory defense to Maine's state court action to enforce the levies. And it is settled beyond peradventure that federal question jurisdiction will not lie if the asserted federal right "is in reality in the nature of a defense to a threatened

> [state court] action." The rule has force whether the state court enforcement action is, as here, actually pending, or . . . merely "threatned." It applied to all suits—whether for declaratory or injunctive relief—which represent "a defensive maneuver" in response to a state court enforcement action. The federal courts cannot be used as a launching pad from which to "engage in a preemptive strike" aimed at exploring the state suit.

Id. at 535 (citations omitted).

To complete our analysis, therefore, we consider whether the coercive actions anticipated by the Band's complaint would arise under federal law. If so, jurisdiction is proper under section 1331.

[11] Had the Band not instituted the present action, Miller would have sought recovery of the disputed rents by instituting an action against the Band for breach of lease.[8] Breach of lease is a cause of action under state,

---

[8]The Counterclaim filed by Miller in response to the Band's amended complaint alleged, *inter alia*, a violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302 (1982). The Board argues that such coercive claim arises under federal law, hence the district court had jurisdiction over the Band's action. Claims for damages are not cognizable under the ICRA. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 (9th Cir. 1980). Even if Miller's claim were cognizable, it is not a claim to rent under the lease, hence it is not one of the coercive actions anticipated by the Band's interpleader claim.

Miller argues that his coercive action would have arisen under 25 U.S.C. § 345 and 28 U.S.C. § 1353. As noted above, these sections confer the district courts with jurisdiction over suits in which an Indian's interest in allotted trust land is at issue. Slip op. at 11869. These sections do not authorize jurisdiction over an action to recover rents owing under a lease of

(Continued on following page)

not federal, law. The fact that the lease was entered into under authority conferred by federal statutes would not

---

(Continued from previous page)

a building, even when the building happens to sit on allotted trust land. The cases on which Miller relies are distinguishable in that each was an action to protect an Indian's right to, or interest in, allotted trust land. *See Begay v. Albers*, 721 F.2d 1274, 1276 (10th Cir. 1983) (suit by individual Indians to cancel certain allegedly forged deeds purporting to convey their fee interests in allotted tracts; plaintiffs sought recovery of possession and an order quieting their beneficial title); *Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979) (suit by individual Indians seeking compensation for right-of-way over their allotted lands taken by federal government and municipality; federal statutes protected Indian allottees from improvident grants of rights-of-way); *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir.) (suit by individual Indians seeking injunctive relief to prevent federal government from charging against the Indians' trust lands the costs of constructing a lateral irrigation line; charges amounted to a lien on the lands, which impaired Indians' interests therein), *cert. denied*, 400 U.S. 942 (1970).

Our understanding of the scope of jurisdiction conferred by §§ 345 and 1353 is confirmed by the Supreme Court's pronouncement on the subject in *United States v. Mottaz*, 476 U.S. 834 (1986). The Court in *Mottaz*, citing *Scholder*, declared that § 345 contemplates two types of suits: those seeking the issuance of an allotment, and those involving an Indian's interest in or right to an allotment once he has acquired it. *Id.* at 845. Miller's coercive action against the Band would have fallen into neither category.

In *Keechi v. United States*, 604 F. Supp. 267 (D.D.C. 1984), also cited by Miller, the court ruled it had jurisdiction under §§ 345 and 1353 over an individual Indian's suit seeking to prevent the IRS from enforcing a levy on royalties derived from an oil and gas lease of plaintiff's allotted trust land. To the extent *Keechi* can be read to mean that §§ 345 and 1353 provide a basis for jurisdiction over any suit in which an Indian seeks to collect or preserve income derived from leases of allotted trust lands, the opinion is inconsistent with the foregoing authorities. *Keechi*, however, need not be read so broadly. The funds at issue there were not rents due under the lease of a capital improvement but royalties earned from oil production, an activity that depletes the land's resources and, thus, reduces the value of the allottee's interest in the land.

transform Miller's state-law breach of lease claim into one arising under federal law. *See Gila River Indian Community*, 626 F.2d at 714-15 (Indian tribe's claim against private parties for breach of commercial contract did not arise under federal law); *Littell v. Nakai*, 344 F.2d 486, 488 (9th Cir. 1965) (no federal jurisdiction over action by general counsel of Indian tribe against chairman of tribal council to enjoin alleged interference with counsel's performance of retainer contract, notwithstanding that contract had been authorized under federal law and approved by federal officials), *cert. denied*, 382 U.S. 986 (1966). The Band's likely federal-law defenses—sovereign immunity and lack of approval of the lease by the Secretary of the Interior— would not be part of Miller's well-pleaded complaint for breach of lease and, thus, would not support federal jurisdiction over Miller's state-law claim.[9]

---

[9]In *Barona Group v. American Management & Amusement, Inc.*, 824 F.2d 710 (9th Cir. 1987), we exercised jurisdiction, without discussion, over an action in which an Indian tribe sought a declaration that a bingo management agreement was null and void under 25 U.S.C. § 81 for lack of approval by the Secretary. The tribe's claim for declaratory relief was coupled with a claim for breach of contract and damages, over which we clearly had jurisdiction. *Id.* at 714; *see* 25 U.S.C. § 81 (1982) (granting jurisdiction over action by the United States, as trustee, seeking recovery of money paid by Indian tribe pursuant to unapproved contract relative to tribe's land); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976) (under 28 U.S.C. § 1362, federal court has jurisdiction over action by tribe alleging "the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought"). We, therefore, had pendent jurisdiction over the tribe's claim for declaratory relief. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966) (defining federal pendent jurisdiction over state-law claims). Unlike the plaintiff in *Barona Group*, the Band in the present case did not allege a claim under section 81 or under any other federal law.

[12] The Band's interpleader action also anticipated a coercive action by the Board to enforce its tax levy against rent owed to Miller in the possession of the Band. The anticipated enforcement action would not arise under federal law. *See Franchise Tax Bd.*, 463 U.S. at 13 (state tax board's action to enforce levy against ERISA-covered vacation benefit plan did not arise under federal law; "federal law becomes relevant only by way of a defense to an obligation created entirely by state law"); *Neves*, 837 F.2d at 535 (interpleader action that anticipated enforcement action by state tax authority did not arise under federal law). Federal questions, *e.g.*, whether the Band is immune from a state tax levy under the federal common law doctrine of tribal sovereign immunity, would be injected into the Board's state-law action only by way of defense.

Finally, the Band's action anticipated a coercive action by the Board against Miller, for the collection of state taxes. A state's action to collect state taxes is plainly one arising under state, not federal, law. Again, federal-law issues would arise only in defense.

IV. CONCLUSION

We have concluded that jurisdiction over the Band's complaint in interpleader was improper under 28 U.S.C. § 1335, because the adverse claimants are not of diverse citizenship; improper under 25 U.S.C. § 345 and 28 U.S.C. § 1353, because Miller's right to an allotment of land is not at issue; improper under 28 U.S.C. §§ 2201-2202, because those sections do not grant jurisdiction to the district courts; and improper under 28 U.S.C. §§ 1331 and 1362, because the Band's well-pleaded complaint alleges

no claim under federal law and the coercive actions anticipated by the Band's complaint would arise under state law. Accordingly, the district court had no subject matter over the Band's action. The district court's judgment in this action is VACATED and the matter is REMANDED with instructions that it be DISMISSED for lack of jurisdiction. On dismissal of the action, the funds deposited into the district court's registry by the Band shall be returned to the Band. The parties shall bear their own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MORONGO BAND OF MISSION INDIANS AND JUSTUS MANAGEMENT COMPANY OF CALIFORNIA, INC., Plaintiffs, v. CALIFORNIA STATE BOARD OF EQUALIZATION, et al., Defendants.	No. C 83 6190 SC ORDER RE MOTIONS FOR SUMMARY JUDGMENT (Filed April 24, 1987)

This case is before the court on plaintiff Morongo Band of Mission Indians' ("Band") and Defendants California State Board of Equalization's ("Board") and Clive Miller's ("Miller") cross motions for summary judgment. The Board and Miller have agreed to a settlement between themselves. Thus, their interests are the same for the purposes of this motion.

The facts are not in dispute. The Band is a federally recognized Indian Tribe. It is the beneficial owner of the unallotted trust lands within the exterior boundaries of the Morongo Indian Reservation ("the Reservation"). Defendant Miller is a member of the Band. He is the beneficial owner of a parcel of allotted trust land within the boundaries of the Reservation. There is a large building suitable for use as a bingo hall on Miller's land.

In April 1983, the Band enacted a tribal ordinance to regulate the operation of and participation in bingo and related games on the Reservation. It also established the Morongo Tribal Bingo Enterprises. In the same referendum, the Band approved the execution of two agreements which would implement the Tribal Bingo Enterprises: (1) a bingo management agreement between Band and plaintiff Management Company of California, Inc. ("Justus") under which Justus would provide the capital and management expertise for operating the Bingo enterprise; and (2) a lease between the Band and Miller for the use of Miller's land on which stood the bingo hall and appurtenant facilities. Article three of the lease states that it is subject to the approval of the Secretary of the Interior ("Secretary").

Both the management agreement and the lease were executed on or about April 26, 1983. At about the same time, Miller and Walter Justus executed a separate joint venture agreement which gave Miller a right to participate in and financially benefit from Justus' management of the Band's bingo enterprise. The Secretary never approved the management agreement, lease, or joint venture.

The bingo enterprise began operating under Justus' management on Miller's land on or about April 30, 1983, and continued until February 1984.

During May, June, July, and August of 1983, the Band paid Miller $73,000 per month for the use of his allotment. On August 16, 1983, the Board served a Notice of levy upon the Band and Justus which levied:

> All monies, debts, credits and other personal property belonging to the above named [Miller], and more spe-

> cifically, but not limited to, monies being held as rental. This levy is effective for a period of one year. You must continue to withhold all payments to the above referenced taxpayer and remit them to this office no later than 10 days after the due date.

According to the notice of levy, the total amount to be paid over to the Board was $617,312.11. In December 1983, the Band and Justus, as the Band's agent and custodian of the funds of the Band's bingo enterprise, paid $292,000.00 into the registry of the court, and filed this action.

The Band never consented to either the Board's levy or suit by Miller for rent, damages, or other relief.

Summary judgment is proper only when there is no genuine issue of material fact or when, viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. —, 91 L.Ed.2d 265 (1986).

The Band claims that it is entitled to summary judgment because the lease is not valid. Plaintiff's memorandum in support of motion for summary judgment ("Plaintiff's memorandum") pp. 13-14. The Band argues the lease is not valid because it was not approved by the Secretary in accordance with 25 U.S.C. § 415 and its own terms. *Id.* The Band further asks that Miller's counterclaim be

dismissed. The Band argues that its status as a sovereign tribe prevents Miller from counterclaiming against it. *Id.* pp. 16-19. The Band argues that none of Miller's counterclaims can be characterized as a claim for recoupment. *Id.* pp. 17, 18. Defendants make a cross motion for summery judgment. They argue that 25 U.S.C. § 415 does not apply to the lease. State Board of Equalization memorandum in support of cross motion for summary judgment ("Board memorandum") pp. 7-10. They also argue that Miller's counterclaim can validly be characterized as a claim for equitable recoupment. Miller memorandum in opposition to plaintiff's motion for summary judgment ("Miller memorandum") pp. 16-17.

The preamble to the lease states that it is governed by the provisions of 25 U.S. § 415. Complaint, Exhibit B. 25 U.S.C. § 415 provides that "any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior . . ." Accordingly, Article 3 of the lease states that it is subject to the approval of the Secretary. Complaint, Exhibit B. Therefore, in order for the lease to be valid, it must be approved by the Secretary.

The Secretary never approved the lease. Robert Martin Declaration, p. 4. Thus, it is not a binding agreement and plaintiff is not liable under it for rent.

Recoupment is a demand arising from the same transaction as the plaintiff's claim. 3 Moore, *Federal Practice*, ¶ 13.02 at 13-13, n. 1 (2d ed. 1985). The doctrine of recoupment provides that

> when the sovereign sues it waives immunity as to claims of the defendant which assert matters in re-

> coupment—arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim but not to the extent of a judgment against the government which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the government's claims; but the sovereign does not waive immunity as to claims which do not meet the "same transaction or occurrence test" nor to claims of a different form or nature than that sought by it as plaintiff nor to claims exceeding in amount that sought by it as plaintiff.

Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir. 1982), *citing Frederick v. United States,* 386 F.2d 481, 488 (5th Cir.) 1967. Equitable recoupment is applicable to Indian tribes. *Jicarilla Apache Tribe,* 687 F.2d at 1344.

The court finds that Miller's counterclaim arises out of the same transaction or occurrence as plaintiff's case. The parties are arguing over who owns the $292,000 plaintiff deposited into the court because of defendant Board's notice of levy. The Band itself described this money as representing "the amounts due and payable to defendant CLIVE MILLER for the lease [by the Band] of his land from the date of service of the Levy by the State Board of Equalization upon the plaintiffs herein until the present." Notice of Deposit dated December 23, 1983 (capitalization in the original).

Thus, the court grants Miller summary judgment on his counterclaim for the reasonable value of the use of his trust allotment. The court finds this amount to be $292,000. $292,000 represents four months' rent, or the months of September, October, November, and December of 1983. Al-

though the lease is not valid because the Secretary did not approve it, the parties negotiated its terms. The court finds nothing to suggest that the parties did and do not believe the leased property was worth $73,000 per month.

In accordance with the foregoing, the court orders that:

(1) plaintiff's motion for summary judgment on the issue of the validity of the lease is granted;

(2) plaintiff's motion to dismiss Miller's counterclaims is denied; and

(3) defendants Board's and Miller's motion for summary judgment on Miller's counterclaim for the reasonable value of the use of his trust allotment is granted in the amount of $292,000.

Dated: March 23, 1987.

/s/ Samuel Conti
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MORONGO BAND OF MISSION INDIANS AND JUSTUS COMPANY OF CALIFORNIA, INC.,	)	No. C 83 6190 SC
Plaintiffs,	)	JUDGMENT
v.	)	(Filed March 24, 1987)
CALIFORNIA STATE BOARD OF EQUALIZATION, et al.,	)	
Defendants.	)	

In accordance with the order entered by the court herein, it is hereby ordered, adjudged and decreed that:

(1) plaintiff's motion for summary judgment on the issue of the validity of the lease is granted;

(2) plaintiff's motion to dismiss Miller's counterclaims is denied; and

(3) defendants Board's and Miller's motion for summary judgment on Miller's counterclaim for the reasonable value of the use of his trust allotment is granted in the amount of $292,000, and this action is dismissed.

Dated: March 23, 1987.

/s/ Samuel Conti
United States District Judge

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-695

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

CLIVE MILLER, a Member of the
Morongo Band of Mission Indians,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE FORMAN
Counsel of Record
BARBARA E. KARSHMER
A Professional Corporation
ALEXANDER & KARSHMER
1950 Addison Street
Suite 109
Berkeley, California 94704
(415) 841-5056
Attorneys for Respondent

---

42 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	11
INTRODUCTION	11
ARGUMENT	12
I. THE DECISION OF THE COURT OF APPEALS DOES NOT INVOLVE IMPORTANT ISSUES OF INDIVIDUAL INDIAN RIGHTS	12
II. THERE IS NO NEED TO INTERPRET THE SCOPE OF 25 U.S.C. §1362 IN THE CIRCUMSTANCES OF THIS CASE	16
III. THE NINTH CIRCUIT'S INTERPRETATION OF F.R.CIV.P. 22 DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS	21
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES

A.K. Management Co., Inc. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986) 3, 14

Bacher v. Patencio, 368 F.2d 1010 (9th Cir. 1966) 13

Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985) . . 22, 24, 25

Bunch v. Cole, 263 U.S. 250 (1923) . 13

Celotex Corp. v. Catrett, 477 U.S. ____, 91 L.Ed.2d 265, 106 S.Ct. 2548, 2552-53 (1986) 18

Chemehuevi Tribe v. California State Board of Equalization, 757 F.2d 1047 (9th Cir. 1985), rev'd in part on other grounds, ____ U.S. ____, 106 S.Ct. 839 (1986) 3, 12, 26

Fair Assessment in Real Estate Ass'n. v. McNary, 454 U.S. 100 (1981) 27

Franchise Tax Board v. Construction Laborers Trust, 46 U.S. 1 (1983) . . 25

Frederick v. United States, 386 F.2d 481 (5th Cir., 1967) 20

Lawrence v. United States, 381 F.2d 989 (9th Cir. 1967) 13

Miller v. McClain, 249 U.S. 309 (1919) . 13

Moe v. Confederated Kootenai and Salish Tribes, 425 U.S. 463 (1976) 16

Northeast Fed. Credit Union v. Neves, 837 F.2d 531 (1st Cir. 1988) 24

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 16

Portland Retail Druggists v. Kaiser Foundation, 662 F.2d 641 (9th Cir. 1981) 10, 19

Sage v. Hamp, 235 U.S. 99 (1914) . . 13

St. Louis U. Trust Co. v. Stone, 570 F.2d 833 (8th Cir. 1978) 21-25

United States ex rel. Buxbom v. Naegele Outdoor Advertising Co., 739 F.2d 473 (9th Cir. 1984) 14

United States v. Emmons, 351 F.2d 603 (9th Cir. 1965) 13

United States v. Jim, 409 U.S. 80 (1972) 27

United States v. McConney, 728 F.2d 1195 (9th Cir., en banc, 1984), cert. den. 469 U.S. 824 20

United States v. Testan, 424 U.S. 392 (1976) 26

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 3

Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (6th Cir. 1985) 4, 14

STATUTES

25 U.S.C. §348 25

25 U.S.C. §81 . . . . . 3, 14, 25

25 U.S.C. §410 15

25 U.S.C. §415 . . . . . 4, 14, 25

25 U.S.C. §1302 5

28 U.S.C. §1331 . . . . . 21, 22, 25

28 U.S.C. §1341 26

28 U.S.C. §1362 . . . . . 11, 16, 17

RULES AND REGULATIONS

25 C.F.R. Part 162 25

F.R.Civ.P. 12 . . . . . 6, 9, 10, 19

F.R.Civ.P. 22 . . . . . 12, 21-24

F.R.Civ.P. 56 . . . . . 6, 10

F.R.Civ.P. 12 . . . . . 6, 9, 10, 19

F.R.Civ.P. 22 . . . . . 11, 20-22, 24

F.R.Civ.P. 56 . . . . . 6, 10

OTHER AUTHORITIES

10A Wright, Miller & Kane, Federal Practice and Procedure (1983) §2725 . 18

Schwartzer, "Summary Judgment Under the Federal Rules", 99 F.R.D. 465, 488 (1984) 18

No. 88-695

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

CLIVE MILLER, a Member of the
Morongo Band of Mission Indians,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Respondent, the Morongo Band of Mission Indians ("Band") is in substantial agreement with Petitioner's Statement of the Case, except for Petitioner's description of both the district court's handling of the

dispositive motions and the substance of the district court's decision. Because those matters may materially affect whether the Petition should be granted, the Band has set forth below its own brief account of the district court's proceedings.

When this action was filed, the Band lacked the financial resources to litigate any claim which it may have had to ownership of the deposited funds (CR 67). Moreover, at that time the law governing State taxation of on-Reservation cigarette sales, Tribal sovereign immunity and Tribal gaming activities was in a state of flux. Thus, when the Band was confronted by the conflicting demands of Petitioner and the California State Board of Equalization ("BOE") to funds in its possession, the Band had no real

choice except to file a complaint in the nature of interpleader (CR 67).

Subsequent to the filing of the original complaint, there were substantial changes in both the law and the Band's economic circumstances. Legal uncertainties about State jurisdiction to tax on-Reservation cigarette sales to non-Indians were resolved in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) and Chemehuevi Tribe v. California State Board of Equalization, 757 F.2d 1047 (9th Cir. 1985), rev'd in part on other grounds, ____ U.S. ____, 106 S.Ct. 839 (1986). Chemehuevi also confirmed the continuing viability of Tribal sovereign immunity. The application of 25 U.S.C. §81 to Bingo management and similar contracts was established in, inter alia, A.K. Management Co., Inc. v. San Manuel

Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986), and Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (6th Cir. 1985). Meanwhile, the Band also had acquired the financial resources necessary to assert and litigate its own claims to the deposited funds (CR 67).

Based upon the Band's changed economic circumstances and the aforementioned developments in the case law, the Band sought and obtained leave to file an amended complaint asserting that enforcement of BOE's levy was barred by the Band's unwaived sovereign immunity; that the purported lease between the Band and Petitioner was null and void for lack of approval by the Secretary of the Interior pursuant to 25 U.S.C. §415, thereby relieving the Band from liability under the lease, and thus that the Band,

rather than BOE or Petitioner, owned and was entitled to the return of the deposited funds.

BOE filed an answer to the amended complaint (CR 80). Petitioner filed an answer (CR 82), and also counterclaimed (CR 83) for rent and attorneys' fees under the purported lease, the reasonable value of the use of his lands, and money damages for "bad faith" and the alleged violation of Petitioner's rights under the Indian Civil Rights Act, 25 U.S.C. §1302(2), (5), and (8).

Contending that the material facts were undisputed, that the Band's unwaived sovereign immunity barred BOE's levy and that the lack of Secretarial approval of either the purported lease between Petitioner or the related agreements for management of the Band's Bingo enterprise rendered those documents null and void,

the Band moved under F.R.Civ.P. 56 for summary judgment on the claims in its amended complaint (CR 84). The Band's motion for summary judgment was based upon the pleadings, a supporting memorandum, exhibits and various other materials (CR 84).

Simultaneously, the Band also moved under F.R.Civ.P. 12b(1), (2) and (6) to dismiss Petitioner's counterclaim on the grounds that the Band's sovereign immunity deprived the district court of jurisdiction over the counterclaim, and that the counterclaim otherwise failed to state a claim upon which relief could be granted (CR 84). The Band's motion to dismiss was not based upon any matters outside of the pleading, nor was reference to any such matter necessary to the determination of the motion.

BOE filed a cross-motion for summary judgment on the amended complaint (CR 97). Petitioner filed a memorandum of points and authorities in opposition to the Band's motions, and a separate declaration in opposition to the Band's motion for summary judgment (CR 92). However, neither BOE nor Petitioner moved for summary judgment on Petitioner's counterclaim. In fact, no party ever moved for summary judgment on Petitioner's counterclaim.

As was its custom, the district court took the Band's and BOE's respective motions under submission without oral argument. At no time prior to the issuance of its ruling did the district court notify the parties of its intention to rule on any motions other than the Band's and BOE's cross-motions for summary judgment on the amended

complaint and the Band's motion to dismiss Petitioner's counterclaim. Most significantly, the district court never informed the parties that it planned to decide the merits of any part of Petitioner's counterclaim, to determine the reasonable value of the use of Petitioner's land, or to grant judgment on the counterclaim.

On March 26, 1987, the district court entered its order on the pending motions (CR 102). The court granted summary judgment in favor of the Band on its claim that it owed Petitioner nothing under the lease because the lease had not been approved by the Secretary of the Interior, denied the Band's motion to dismiss what the court characterized as Petitioner's claim in recoupment for the reasonable value of the use of his land, found as a matter of undisputed and

indisputable fact that the reasonable value of said use was $73,000 per month, entered judgment in favor of Petitioner in the amount of $292,000 and dismissed the action without instructions as to disbursement of the deposited funds.

The Band filed a timely motion for reconsideration and for a stay of judgment pending appeal (CR 104). In its motion for reconsideration, the Band explained that no party had moved for summary judgment, that its motion to dismiss the Petitioner's counterclaim had been confined to the face of the counterclaim, that the district court had not given any notice of its intention to treat the Band's motion to dismiss the counterclaim under F.R.Civ.P. 12(b)(6) as a motion for summary judgment, and that had it been given a chance to do so, the Band could have shown the existence of a

genuine issue of fact concerning the reasonable value of its use of Petitioner's land.

The Band contended that under the foregoing circumstances, and under such cases as Portland Retail Druggists v. Kaiser Foundation, 662 F.2d 641 (9th Cir. 1981), the district court lacked the power to sua sponte enter summary judgment on Petitioner's counterclaim without at least giving the Band the notice required by F.R.Civ.P. 12(b), and the "reasonable" opportunity to respond required by F.R.Civ.P. 56(c), (e) and (f). Id.

After further briefing by the parties (CR 105, CR 107, CR 108, CR 109), and once again without oral argument,[1/]

[1/] The Band specifically requested oral argument (CR 110). The district court never ruled on that request.

the district court denied the Band's motion for reconsideration, but stayed release of the deposited funds pending appeal (CR 111). That order, entered on June 23, 1987, is set forth in the Appendix hereto.

REASONS FOR DENYING THE PETITION

INTRODUCTION

Contrary to Petitioner's statement of reasons for granting the writ, this case does not raise any important issues concerning the rights of an individual American Indian under any federal statute; the Ninth Circuit's construction of 28 U.S.C. §1362 was not inconsistent with any decisions of this Court or of other Circuit Courts; and there is no confusion within the Ninth Circuit or among the several circuits regarding the jurisdictional prerequisites to an

interpleader action filed under F.R.Civ.P. 22.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT INVOLVE IMPORTANT ISSUES OF INDIVIDUAL INDIAN RIGHTS

When this case began in 1983, the jurisdiction of the State of California to impose its cigarette tax on Indian sales of cigarettes to non-Indians was still being litigated, and the continuing viability of Tribal sovereign immunity also was under direct attack by BOE. Subsequent to the filing of this action, however, this Court's decision in Chemehuevi Tribe v. California State Board of Equalization, supra, upheld California's jurisdiction to tax the on-Reservation sale of cigarettes to non-Indians, and left intact the decision of the Court of Appeals reiterating the

continuing viability and broad reach of Tribal sovereign immunity. Thus, the questions of the validity of BOE's claim against Petitioner and its power to seize funds in the Band's possession have been resolved, and no longer merit this Court's consideration.

Although this Court had established long before this action was filed that leases and other agreements involving Indian trust lands are null and void without the approval of the Secretary of the Interior, see, e.g., Bunch v. Cole, 263 U.S. 250 (1923); Sage v. Hamp, 235 U.S. 99 (1914); Miller v. McClain, 249 U.S. 309 (1919); see also, United States v. Emmons, 351 F.2d 603 (9th Cir. 1965); Lawrence v. United States, 381 F.2d 989 (9th Cir. 1967); Bacher v. Patencio, 368 F.2d 1010 (9th Cir. 1966), when this action was filed the question whether 25

U.S.C. §81 applied to the kinds of transactions which had occurred among the Band, Petitioner, and the Band's putative Bingo manager had not received significant judicial scrutiny. Subsequent to the filing of this action, however, several federal appellate decisions definitively established that such transactions are subject to 25 U.S.C. §81 and/or 415, and thus are null and void without the approval of the Secretary of the Interior. See, e.g., Wisconsin Winnebago Business Committee v. Koberstein, supra; A.K. Management Co., Inc. v. San Manuel Band of Indians, supra; see also, United States ex rel. Buxbom v. Naegele Outdoor Advertising Co., 739 F.2d 473 (9th Cir. 1984). Thus, there is no need for this Court to address that issue, either.

To the extent that 25 U.S.C. §410 requires further interpretation by this Court, this case is not the proper occasion for such review. The issue was not addressed at all in the lower courts and, as correctly held by the Ninth Circuit, Petitioner's claim under §410 is a defense to BOE's claim against Petitioner which can only be raised in a State court proceeding by BOE against Petitioner. Moreover, given that the purported lease was and is null and void for lack of Secretarial approval, it is questionable whether such a defense even exists.

Thus, it seems clear that Petitioner owes BOE the sums which were the subject of BOE's levy, the Band's sovereign immunity precludes BOE from enforcing the levy against the Band, and that 25 U.S.C. §410 is inapplicable to

Petitioner's income from the null and void lease. Because there is no need for further consideration of any of these issues, there is no need to grant the writ sought by Petitioner.

II.

THERE IS NO NEED TO INTERPRET THE SCOPE OF 25 U.S.C. §1362 IN THE CIRCUMSTANCES OF THIS CASE

According to the Petition, this case

> raises the important question whether Congress in enacting [28 U.S.C.] §1362 intended to grant an Indian Band . . . greater access to the District Court than the Band would have under [28 U.S.C.] §1331, by expanding its 'arising under' jurisdiction.

Petition, page 9. The Band agrees that the Ninth Circuit interpreted §1362 more narrowly than it could have,[2/] and the Band would like nothing more than to see

---

2/ See, e.g., Moe v. Confederated Kootenai and Salish Tribes, 425 U.S. 463 (1976); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

28 U.S.C. §1362 construed in all cases to give Tribes exactly the same access to the district court as is enjoyed by the United States. However, in the context of the case the Ninth Circuit's construction of 28 U.S.C. §1362 clearly was not so far outside the mainstream of the decisions of this Court as to justify review. Indeed, even if the Ninth Circuit's construction or application of 28 U.S.C. §1362 was completely wrong, review would fulfill no useful purpose, because the ultimate outcome of the case would be the same in any event.

The Court of Appeals remanded the case and ordered its dismissal for lack of jurisdiction; therefore, it never reached the merits of the Band's appeal. If the case were to be reinstated, the only conclusion which the Court of Appeals could reach would be that the

district court committed reversible error in sua sponte granting summary judgment on Petitioner's counterclaim in the absence of a motion therefor and without giving the Band prior notice and an opportunity to respond. See, e.g., Celotex Corp. v. Catrett, 477 U.S. ____, 91 L.Ed.2d 265, 106 S.Ct. 2548, 2552-53 (1986).[3/] See also, Schwartzer, "Summary Judgment Under the Federal Rules", 99 F.R.D. 465, 488 (1984); 10A Wright,

---

[3/] Although the district court cited Celotex as authority for its action (CR 111), the district court misapplied or misunderstood that decision. Celotex clearly supports the authority of the district court to enter summary judgment against a moving party in the absence of a cross-motion, and also to initiate summary judgment proceedings sua sponte. However, Celotex does not authorize the district court to sua sponte enter summary judgment on a claim in the absence of a motion therefor without giving the parties advance notice of its intention to do so, especially when a party has timely moved to dismiss a counterclaim for lack of jurisdiction.

Miller & Kane, Federal Practice and Procedure (1983) §2725; Portland Retail Druggists v. Kaiser Foundation, supra.

Upon reversing the district court's decision upon the basis of prejudicial procedural errors, the Court of Appeals would have found that the facts material to the resolution of the Band's and BOE's claims were undisputed, and that the Band was entitled to judgment as a matter of law that neither BOE nor Petitioner had any claim to the deposited funds. The Court of Appeals would also have held that Petitioner's counterclaim should be dismissed pursuant to F.R.Civ.P. 12(b)(2) and (6). At worst, the case would have been remanded for the Band to file an answer and proceed to trial on the counterclaim.

The only claim which Petitioner possibly could assert on remand would be

by way of recoupment. Frederick v. United States, 386 F.2d 481 (5th Cir., 1967). Thus, Petitioner could not obtain any affirmative relief against the Band, id., and could not recover any of the deposited funds.4/ In all probability, however, the Court of Appeals would have entered final judgment on the merits, in the absence of any genuine issue of material fact. See, e.g., United States v. McConney, 728 F.2d 1195 (9th Cir., en banc, 1984), cert. den. 469 U.S. 824.

For all of these reasons, review by this Court would be a meaningless exercise, and thus review is unwarranted.

4/ Because the Band sought no recovery of money from Petitioner, there really was no claim for Petitioner to recoup against.

III.

THE NINTH CIRCUIT'S INTERPRETATION OF F.R.CIV.P. 22 DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

According to Petitioner, the decisions of the Sixth, Eighth, and Ninth Circuits are in such conflict as to the requirement that an interpleader action brought under F.R.Civ.P. 22 also must arise under federal law within the meaning of 28 U.S.C. §1331, that this Court should grant the Petition to resolve that conflict. However, an examination of the cases which Petitioner alleges are in conflict reveals that the cases are entirely consistent, and thus that review is unnecessary.

In St. Louis U. Trust Co. v. Stone, 570 F.2d 833 (8th Cir. 1978), funds had been deposited into escrow in a dispute between the United States and a defendant in a civil action for fraud. The

Internal Revenue Service levied upon the funds to satisfy a lien for unpaid federal taxes, and the escrow holder filed a Rule 22 interpleader action to declare its rights and obligations under the escrow agreement. Noting that "federal tax liens are specifically governed by a detailed federal statutory scheme[,]" and that, "matters directly affecting the nature or operation of such liens are federal questions," the Eighth Circuit held the district court had federal question subject matter jurisdiction; in essence, the Circuit held that a suit involving a federal tax lien per se involves a federal question under 28 U.S.C. §1331.

In Bell & Beckwith v. United States, 766 F.2d 910 (6th Cir. 1985), the Sixth Circuit did not question the Eighth Circuit's holding in Stone, supra, that a

Rule 22 interpleader action must arise under federal law. Rather, the Sixth Circuit explicitly analyzed and endorsed an assumption which was implicit in Stone, i.e., that a Rule 22 interpleader action was analogous to an action for declaratory relief, and thus that a federal question is present if a defendant has a coercive federal claim against the plaintiff. The Sixth Circuit disagreed with Stone only to the extent that the latter held that any dispute involving a federal tax lien per se arises under federal law. The Sixth Circuit proceeded to find a federal claim lacking because the threshold question -- ownership of the funds -- was purely a question of State law, prior resolution of which would eliminate the federal issues.

The Ninth Circuit's decision in this case did not question the principles expressed in either Stone or Bell & Beckwith (or, for that matter, in Northeast Fed. Credit Union v. Neves, 837 F.2d 531 (1st Cir. 1988)). Rather, the decision of the Court of Appeals in this case rested upon those very same jurisdictional principles.

Petitioner's real complaint is not that the Circuits are in conflict about the jurisdictional prerequisites of a Rule 22 interpleader action, but that the Court of Appeals erred in its application of those principles in this case. This claim, too, is incorrect.

The Court of Appeals correctly identified three possible coercive claims in this case: an action by BOE against the Band to enforce the levy; an action by BOE against Petitioner to collect

State taxes; and an action by Petitioner against the Band for breach of the purported lease and collection of rents thereunder. There can be no doubt that the two possible actions by BOE both arose entirely under State law, and thus could not have supported jurisdiction under 28 U.S.C. §1331 under Bell & Beckwith or Stone. See also, Franchise Tax Board v. Construction Laborers Trust, 46 U.S. 1 (1983).

Petitioner's claim against the Band for rent due under the lease is not as patently rooted in State law as the Court of Appeals found, because both the existence of the lease and the relationship and rights of the parties thereunder may depend in substantial measure upon federal law. See, e.g., 25 U.S.C. §§81, 348, 415; 25 C.F.R. Part 162. Nonetheless, Petitioner still could not have

invoked the district court's jurisdiction of a federally-cognizable claim against the Band, because the Band has never consented to either the creation of a cause of action for breach of the purported lease, or an action by Petitioner thereunder. See, e.g., United States v. Testan, 424 U.S. 392 (1976); see also, Chemehuevi Tribe v. California State Board of Equalization, supra.

Petitioner contends that the Court of Appeals overlooked two other potential coercive claims which he could have brought: a claim against a State official in his individual capacity to enjoin enforcement of BOE's levy; and a claim against a Band member in his individual capacity to enjoin the Band from honoring the BOE's levy. However, any action by Petitioner against a State official would have been barred by 28

U.S.C. §1341, Fair Assessment in Real Estate Ass'n. v. McNary, 454 U.S. 100 (1981), and even assuming that the funds in the Band's possession were derived from a lease of trust land, Petitioner never demonstrated the existence of a federal jurisdictional basis for an action against an individual Band member to prevent disposition of the Tribal funds in which individuals have no vested rights. See, e.g., United States v. Jim, 409 U.S. 80 (1972).

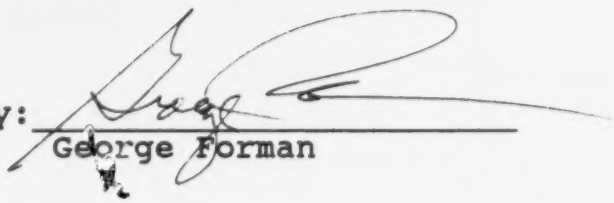
For these reasons also, review is unnecessary.

CONCLUSION

For all of the foregoing reasons, the Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated: November 18, 1988.

GEORGE FORMAN
Counsel of Record
BARBARA E. KARSHMER
A Professional Corporation
ALEXANDER & KARSHMER
Attorneys for Respondent
Morongo Band of Mission
Indians

By: 
George Forman

APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MORONGO BAND OF INDIANS and JUSTUS MANAGEMENT COMPANY OF CALIFORNIA, INC., Plaintiffs, v. CALIFORNIA STATE BOARD OF EQUALIZATION, et al., Defendants.	NO. C 83 6190 SC ORDER RE MOTIONS FOR RECONSIDERATION AND STAY (Filed June 22, 1987)

Plaintiff Morongo Band of Mission Indians ("Band") and defendant California State Board of Equalization ("Board") move this court pursuant to Fed. R. Civ. P. 59 for an order reconsidering and/or vacating portions of the court's March 24, 1987 order. The Band claims that the court erred in granting summary judgment on defendant Clive Miller's ("Miller's")

counterclaim. The Band asserts that because Miller did not bring a motion for summary judgment, the Band was denied an adequate opportunity to respond. The Band also claims that the court erred in granting summary judgment in favor of Miller and the Board for the reasonable value of the use of Miller's property. The Band argues that genuine issues of material fact exist as to the reasonable value of Miller's trust allotment. The Board, in its motion for reconsideration, claims that the court erred in declaring the lease between the Band and Miller invalid.

I. Band's motion for reconsideration.

The Band claims that the court erred in granting summary judgment on Miller's counterclaim. The Band asserts that

because Miller did not bring a motion for summary judgment, the Band was denied an adequate opportunity to respond.

The court rejects the Band's argument. Once a party moves for summary judgment, the court may sua sponte grant summary judgment to the non-moving party if the records, files, affidavits, and documents of the case show that there is no genuine dispute of a material fact. Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311 (9th Cir. 1982). Because the Band made a motion for summary judgment, Miller did not need to make a motion for summary judgment. By law, the Band was on notice that the court could sua sponte grant summary judgment to Miller if there were no genuine disputes of material facts.

The Band further claims that the court erred in granting summary judgment in favor of Miller and the Board for the reasonable value of the use of Miller's property. The Band argues that genuine issues of material fact exist as to the reasonable value of Miller's trust allotment.

Even if an express contract is not itself valid, it is evidence of what the parties thought reasonable value to be. Fall Sands Gravel Co. v. Western Concrete, Inc., 270 F.Supp. 495 (D. Mont. 1967). Therefore, the court ruled that even though the lease itself was not valid, its terms indicated what the parties thought was the reasonable value of the use of Miller's trust allotment.

The Band argues that Robert Martin's November 25, 1986 declaration provides

evidence that the terms of the lease were not negotiated, and that therefore, the lease cannot be evidence of the reasonable value of Miller's trust allotment.

The court rejects plaintiff's argument. Martin states that Miller presented the Band with a "take it or leave it" proposition for the Tribal Bingo Enterprise. Martin declaration, Par. 4. Martin does not say, however, that the Band was in any way compelled to "take" Miller's proposition. Instead, Martin's declaration states that Miller wanted the Band to sponsor bingo, because he, as an individual, was unable to. Martin declaration, Par. 3-4. The Band does not allege nor does Martin's declaration suggest that the Band was compelled to accept Miller's offer.

The Band presents no other facts as required by Fed. R. Civ. P., 56(e) supporting its contention that the agreed upon lease amount is not the fair market value of the premises. Therefore, the court finds no reason to change its determination that the rental value stated in the lease is what the parties considered the fair market value of the premises.

Accordingly, the court denies the Band's motion for reconsideration of this court's March 24, 1987 order.

II. Board's motion for reconsideration.

The Board, in its motion for reconsideration, claims that the court erred in declaring the lease between the Band and Miller invalid.

According to Fed. R. Civ. P. 59(e), a motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment. The court entered its order May 24, 1987. The Board filed and served its motion April 14, 1987, more than ten days after entry of the court order. Therefore, the court denies the Board's motion for reconsideration.

In any case, the Board offers no new arguments supporting its motion that the court has not previously rejected.

The Band asks this court to stay final judgment and release of funds pending resolution of the Band's appeal to the Ninth Circuit Court of Appeals. The court grants this request. No supersedeas bond is required.

In accordance with the foregoing, the court orders that:

(1) the Band's motion for reconsideration and vacation of the court's March 24, 1987 order is denied;

(2) the Board's motion for reconsideration of the court's March 24, 1987 order is denied; and

(3) the final judgment and release of funds is stayed pending the resolution of the Band's appeal to the Ninth Circuit Court of Appeals. No supersedeas bond is required.

Dated: June 19, 1987.

/s/ Samuel Conti
United States District Judge

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-695

In The
Supreme Court of the United States
October Term, 1988

—o—

CLIVE MILLER, a Member of the Morongo Band of Mission Indians,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

—o—

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

David M. Liberman
3745 Watseka Avenue
Suite 6
Los Angeles, CA 90034
(213) 277-9288

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

No. 88-695

In The
Supreme Court of the United States
October Term, 1988

CLIVE MILLER, a Member of the Morongo Band of Mission Indians,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS,

Respondent.

PETITIONER'S REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The central question in this case is whether the Ninth Circuit erred in holding that the District Court lacked jurisdiction over respondent's interpleader action because, according to the Ninth Circuit, the action did not "arise under" federal law within the meaning of 28 U.S.C. § 1362.

Petitioner argued that Congress in enacting § 1362 intended to expand the scope of "arising under" jurisdiction in the District Court beyond what judicial interpretations of that language would have allowed under 28 U.S.C. § 1331, for suits brought by Indian tribes, and that respondent's interpleader action arose under federal law within the meaning of § 1362.

Respondent agrees that the Ninth Circuit construed § 1362 too narrowly, Respondent's Opposition 16, and it does not contend that the District Court lacked jurisdiction. Rather, respondent states, "even if the Ninth Circuit's construction or application of 28 U.S.C. § 1362 was completely wrong," the petition should be denied because, respondent claims, it would ultimately prevail on the merits. Respondent's Opposition, 17-20. The merits, of course, are not before this Court. If the District Court had jurisdiction over the action, this Court should remand the matter for further proceedings. Petitioner believes that on remand he will prevail on the merits.

The fundamental question, whether the "arising under" language of § 1362 is broader than the identical language found in § 1331, is important and should be resolved by this Court in this case.

Dated: November 29, 1988

Respectfully submitted,

DAVID M. LIBERMAN

Attorney for Petitioner